

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

YUBA CITY UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2006100776

**DECISION**

Judith A. Kopec, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on April 10 through 13, 2007, in Yuba City, California.

Roderick L. MacKenzie, Attorney at Law, represented Student. Student's father (Father) also attended the hearing. Student's mother intermittently attended the hearing.

Patrick J. Balucan, Attorney at Law, represented Yuba City Unified School District (District). Doreen Osumi, Assistant Superintendent of Educational Services, and Elizabeth Engelken, Interim Director of Student Support, also attended the hearing on behalf of District.

Student filed the request for due process hearing (Complaint)<sup>1</sup> on October 24, 2006. On November 9, 2006, OAH determined that the Complaint was not legally sufficient and granted leave to amend. Student timely filed an amended Complaint on November 29, 2006. OAH granted the parties' request to continue the hearing on February 2, 2007. The record remained open for the submission of written closing arguments, which were received, and the record was closed and the matter submitted on May 21, 2007.

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<sup>1</sup> A request for a due process hearing under Education Code section 56502 is the due process complaint notice required under Title 20 United States Code Section 1415(b)(7)(A).

## ISSUE<sup>2</sup>

Did District fail to offer Student a free and appropriate public education (FAPE) beginning in November 2005 and continuing through the 2006-2007 school year by failing to meet his unique needs in the areas of core academics and behavior?

## PROPOSED REMEDIES

1. Are Student's parents (Parents) entitled to reimbursement for his placement at Advent Home Youth Services (Advent) from November 2005 through the present?
2. Is Student entitled to continued placement at Advent at District's expense?

## CONTENTIONS OF THE PARTIES

Student contends District failed to offer him a FAPE because he regressed academically and did not perform at or near his grade level. Student also contends District failed to meet his behavioral needs because he repeatedly ran away from campus, which placed him at risk of serious danger.

District contends that it offered Student a FAPE that met his needs in the areas of core academics and behavior in the least restrictive environment.

Student contends that Parents are entitled to reimbursement for his placement at Advent because District failed to offer him a FAPE and Advent provided him an appropriate education. Student also contends that District must continue to place him at Advent in order to provide him a FAPE.

District contends that Student is not entitled to either reimbursement for, or continued placement in, Advent because it offered him a FAPE in the least restrictive environment. District also contends that Student cannot be prospectively placed into Advent because it is a noncertified, sectarian school.

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<sup>2</sup> The issues have been reframed and reorganized for this Decision.

## FACTUAL FINDINGS

### *Background Information*

1. Student is a 14-year-old boy who is currently in the seventh grade at Advent, a nonpublic school in Calhoun, Tennessee. District determined that Student was eligible for special education services in the category of emotional disturbance in October 2000, when he was eight years old and in the second grade.

2. C. Herbert Schiro, M.D.<sup>3</sup>, diagnosed Student with attention deficit, hyperactivity disorder when he was six years old, and with bipolar disorder – mixed, post traumatic stress disorder, and obsessive compulsive disorder when he was eight years old.

3. In February 2001, Student entered a program for emotionally disturbed children operated by Sutter County in Live Oak, California (Live Oak). Student remained at Live Oak through fifth grade, the 2003-2004 school year.

4. Student attended District's Andros Karperos Middle School (AK) during sixth grade, the 2004-2005 school year, and the beginning of seventh grade, the 2005-2006 school year. Parents removed him from AK and unilaterally placed him at Advent beginning November 18, 2005.

### *The 2005-2006 School Year*

5. As described in Legal Conclusions 2 through 4, a school district offers a child a FAPE if it provides a program that is designed to meet the student's unique educational needs, is reasonably calculated to provide educational benefit, and comports with the individualized education program (IEP). A child's progress must be evaluated in light of his disabilities. The appropriateness of an IEP is determined based on the information available to the IEP team at the time it was developed.

### *June 9, 2005 IEP*

6. An IEP team meeting was held on June 9, 2005.<sup>4</sup> The IEP team determined that Student had unique needs in the areas of written expression, mathematics and behavior. Although Student did not expressly challenge the IEP's goals, they must be reviewed in order to determine whether District met his needs in the areas of core academics and

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<sup>3</sup> Dr. Schiro specializes in child psychiatry. He has completed the training and has the experience to be board-certified in general and child psychiatry, but has not taken the examinations necessary for certification.

<sup>4</sup> Student offered evidence of alleged procedural violations concerning this and other IEP team meetings. Even though the ALJ sustained objections to the evidence, and instructed counsel for Student that alleged procedural violations are not at issue, Student again alleged procedural violations in his closing briefs. Student failed to allege any procedural violations in his amended Complaint, they were not included in the issue statement developed at the prehearing conference, and they are not at issue in this hearing.

behavior. The team drafted one goal each in the areas of written expression and mathematics, and two goals in the area of behavior.

### *Core Academics*

7. The IEP includes a written expression goal to develop Student's ability to write a three-paragraph composition. The mathematics goal addresses Student's need to develop his ability to work with fractions. Student offered no evidence that he had any other needs in core academics.

8. Student contends that District failed to provide a FAPE during the 2005-2006 school year because he did not perform at grade level in core academic subjects. The only evidence Student offered in support of this is a statement in his June 2004 IEP, when he transferred to AK from Live Oak, that he was performing at grade level in reading and had only a slight delay in mathematical computation. Student contends that he regressed in core academics in the 2005-2006 school year because his present levels of academic performance indicate that he was not working at grade level in mathematics and written expression. Implicit in Student's contention is that he has been and remains able to perform at grade level in core academics, and any failure to do so results from District's failure to meet his needs. Student's contentions are not supported by the evidence.

9. The statement upon which Student relies is not persuasive. It was included in the IEP by staff at Live Oak, who did not testify at the hearing. District staff at the June 2004 IEP team meeting deferred to Live Oak staff concerning Student's present levels of performance, since they had not worked with Student. In contrast, Student's academic goals while at Live Oak show that he was not performing at grade level. The academic goals developed for his transition from Live Oak to AK also show that he was not performing at grade level during his first year at AK in 2004-2005. Notwithstanding the statement upon which Student relies, Student had not been performing at grade level in core academic areas prior to the 2005-2006 school year.

10. Student offered no other evidence to support his contention that the academic goals failed to meet his unique needs. He offered no evidence that he had academic needs in additional areas. Student offered no evidence that he was not advancing appropriately toward attaining his annual goals or not progressing in the curriculum. He offered no evidence showing that it was unreasonable for the IEP team to conclude that the academic goals were calculated to meet his needs, or to enable him to progress in the curriculum.

11. District offered several accommodations to assist Student. He was allowed to use teachers' notes rather than write his own class notes. He was given extended time and flexible settings for tasks. He was also able to use a multiplication aide to assist him during mathematics tests. Student offered no evidence that additional supplementary aids, services, accommodations, or modifications were required to meet his needs, advance toward attaining his goals, or progress in the curriculum.

12. It is undisputed that Student had unique needs in the academic areas of written expression and mathematics that resulted from his disability. The June 2005 IEP team fashioned academic goals for Student that were reasonably calculated to meet his needs resulting from his disability and to enable him to progress in the curriculum.

### *Behavior*

13. Student contends that District failed to meet his needs in the area of behavior because he repeatedly ran away from campus. As discussed in Legal Conclusions 7 through 10, an IEP team must consider whether a child's behavior impedes his learning or that of others. If it does, the team must consider positive behavior interventions and supports or other strategies to address the child's behavior. A behavior intervention is designed to result in lasting positive changes in the child's behavior through skill acquisition and reduction of the problem behavior.

14. The IEP team determined that Student's behavior impeded his learning and it incorporated the behavior support plan dated February 18, 2005, into the IEP<sup>5</sup>. Student benefits from a structured setting with consistent and familiar routines. He becomes stressed and reacts negatively when he is under academic pressure. Student needs to identify his frustrations and express his concerns, and sometimes needs to remove himself from an academic task until he is calmer and able to resume the task.

### *Behavior Goals*

15. The IEP includes a behavior goal that addresses Student's need to properly respond to academic pressure and develop self control. The other behavior goal addresses his need to remain on task during academic work. In addition, Student continued to have a behavior goal from the February 2005 IEP addressing his need to identify symptoms of frustration and respond with self-break techniques to prevent escalation of his behavior.

16. There is no evidence that Student ran away from school prior to the June 2005 IEP. In spring 2005, prior to the development of the June 2005 IEP, Student exhibited frustration with the demands of school work, was not staying on task during class, and was not following instructions during class. Student's behavior responded favorably to staff's behavioral interventions during spring 2005. Additional behavior goals were added in June 2005 to continue to address these areas.

17. Student offered no evidence to show that the behavior goals failed to meet his unique needs, or he had behavior needs in additional areas. He offered no evidence showing that it was unreasonable for the IEP team to conclude that the behavior goals were calculated to meet his needs. The June 2005 IEP included behavior goals that were reasonably

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<sup>5</sup> The behavior support plan was developed due to an increase in behavioral incidents at school during the 2004-2005 school year. The amended Complaint does not allege any violations concerning the 2004-2005 school year.

calculated to meet Student's needs resulting from his disability and to enable him to progress.

### *Behavior Support Plan*

18. The behavior support plan incorporated into the IEP is thorough and complete. It is based on data collected over 25 days in January and February 2005 concerning Student's noncompliant, disruptive and aggressive behavior. The data reveal that Student was not exhibiting significant aggressive behavior. The plan identifies antecedents to Student's noncompliant and disruptive behavior, such as transitions to nonpreferred activities, taking tests or being academically assessed, and being in unstructured environments. The manifestations of Student's behaviors include escaping or avoiding nonpreferred activities or environments, and expressing frustration. The behavior support plan identifies a variety of specific strategies that his teachers and other staff can use to prevent or respond to Student's behavioral incidents.

19. One of the strategies recommended in the behavior support plan was for school staff to assist Student in identifying when he was becoming frustrated, and allowing him to take breaks in designated areas on campus, such as the library or counselor's office, so that he could de-escalate in a neutral setting. This strategy was incorporated into a behavior goal added on February 18, 2005, discussed in Factual Findings 15. Father was concerned that this technique was not appropriate because it allowed Student to avoid academic work, and eventually led to him running away from campus. The behavior support plan acknowledged the potential for Student to take advantage of this strategy to avoid work, and recommended that Student remain on campus as much as possible to avoid reinforcing escape behaviors.

20. At the time of the June 2005 IEP, the behavior support plan had been implemented for over three months. Student had responded favorably to the techniques implemented by staff. Student offered no evidence showing that the behavior support plan needed to be revised. The behavior support plan includes interventions reasonably designed to result in positive changes to Student's behavior in the least restrictive environment.

### *Special Day Class*

21. Student was in a special day class and received special education support over 70 percent of his school day; the remainder was in the general education environment. Jeff Kuhn taught Student's special day class during his entire time at AK. He has over five years' experience teaching or working with students with emotional disturbances. There are generally seven or eight students in the special day class with Mr. Kuhn and an aide. The special day class is structured and has a consistent schedule. Students are evaluated on a point system in which points are earned to reward appropriate behavior and deducted for negative behavior. The more points a student earns, the more preferred or special activities the student can participate in the following day.

22. The June 2005 IEP was reasonably calculated to meet Student's needs in the areas of academics and behavior resulting from his disability, to advance appropriately toward attaining the goals, and to enable him to progress in the curriculum. It contained goals addressing Student's areas of need, a behavior support plan providing strategies reasonably designed to result in positive changes to his behavior, and a classroom environment providing needed structure and consistency.

#### *Behavioral Incidents*

23. Between September 8 and November 17, 2005, Student ran away from the AK campus on at least five occasions after becoming frustrated or angry.

24. On September 8, 2005, Student was having difficulty with the work required of him in his writing class. He was given a choice of work to do, as recommended in his behavior support plan, but he became agitated and left campus. Mr. Kuhn followed him off campus, as was required by District's protocol. Mr. Kuhn was eventually able to calm Student so that he could return to school for the rest of the day.

25. On September 22, 2005, Student became agitated and was not doing his school work. Staff utilized strategies recommended in the behavior support plan. Student did not respond appropriately when he was offered a choice of tasks to perform. He was given a choice of going to designated places on campus, such as the counselor's office or the library, but he left the classroom without permission. Mr. Kuhn followed him and was unable to persuade him to return to class or another designated location. Student left campus and went home. He received point deductions for his noncompliant behavior during the day.

26. On October 24, 2005, Student was agitated and not doing his academic work. He left the classroom. The classroom aide followed Student and was unable to persuade him to return to class. Student left campus. Another staff member followed him. Student eventually returned to school. He received point deductions for his noncompliant behavior.

#### *November 3, 2005 Addendum IEP*

27. On November 3, 2005, an IEP team meeting was conducted at Parents' request. Parents were concerned that Student's behavior was escalating and he was becoming a danger to himself or others.

#### *Core Academics*

28. The IEP team did not discuss Student's academic performance and made no changes to his goals in academic areas. Student offered no evidence that his academic goals were not reasonably calculated to meet his needs resulting from his disability, or to enable him to progress in the curriculum. Student offered no evidence that additional supplementary aids, services, accommodations, or modifications were required to meet his needs, advance toward attaining his goals, or progress in the curriculum.

## *Behavior*

29. Parents provided the team with information about Advent's program, and requested that District place Student at Advent. They also requested that he be returned to Live Oak. There was no significant discussion of placement options for Student. The meeting ended shortly after Parents made their requests. Parents did not inform the IEP team that they were going to place Student at Advent.

30. As a result of Student's running away during his general education writing class on September 8, 2005, the IEP team removed him from that class and placed him in the special day class for writing. The IEP team made no other changes to Student's June 2005 IEP. The IEP team did not review Student's behavior support plan. Parents did not consent to District's offer of placement and services.

31. Student's behavior support plan requires that in the event of an emergency behavior, the IEP team must meet to determine whether changes in the behavior plan or the IEP are needed. Although the behavior support plan does not define an "emergency behavior," Student's repeated incidents of leaving campus after recommended intervention strategies failed are emergency behaviors that needed to be addressed by the IEP team.

32. An IEP meeting was conducted, at Parents' request, after Student left campus on three occasions. The IEP team made only one change, to switch Student from a general education writing class to the special day class. Although the first time Student ran away from campus, he was having difficulty in his general education writing class, there is no evidence that any of the other incidents were triggered in that class.

33. Student was not harmed during any of the times he ran away from school. However, the risks to him from running away from campus are obvious. Even assuming, as District staff testified, that Student is not the most emotionally-disturbed student attending AK, or his behavior of running away is not the most problematic or disturbing behavior District confronts, it does not alter the fact that in fall 2005, Student's behavior significantly deteriorated. He failed to respond to strategies and interventions that had been successful in the past. His conduct became increasingly defiant and resistant to redirection or intervention. Student's behavior was interfering with his ability to access and benefit from his education. Attempting to respond to Student's behavior consumed so much of Mr. Kuhn's time that other staff were assigned to follow Student when he left the classroom.

34. While it may be true, as Mr. Kuhn testified, that Student's difficulties were at least partly precipitated by the transition to a new school year after summer break, this does not excuse District's failure to quickly and effectively respond to Student's behavior. Student's difficulty with transitions, including the transition to a new school year, and the negative impact they have on his ability to access his education, were known to District. Because of this, once Student's behavior began deteriorating, District was required to respond quickly and as effectively as reasonably possible to review and appropriately revise his IEP.



35. District responded neither quickly nor effectively. On November 3, 2005, the IEP team failed to seriously discuss how to best address Student's run away behavior. District staff abruptly dismissed Parents' requests that District either place Student at Advent or return him to Live Oak. District staff did not propose other changes to Student's IEP. Other than changing Student's writing class, there was no discussion of additional revisions to the IEP's goals, services, accommodations, or behavior support plan.

36. Based on the information known and available to the team on November 3, 2005, it was not reasonable for the team to determine that the only change necessary to Student's IEP was to change his writing class. It is undisputed that Student was capable of academic progress when he was motivated and his behavior was properly regulated. The November 3, 2005 addendum IEP failed to meet Student's unique needs in the area of behavior resulting from his disability, and was not reasonably calculated to provide educational benefit.

#### *Additional Behavioral Incidents and Unilateral Placement at Advent*

37. Student ran away from campus on two more occasions after the November 3, 2005 IEP team meeting. On November 14, 2005, Student left his classroom to go to the library. School staff was unable to find him. Student left campus without school staff being aware of it.

38. On November 17, 2005, Student became frustrated with his school work and left the classroom. Staff followed him and persuaded him to return to class. Student again became angry, left class, and went off campus. Student was apprehended by the police and was taken to a Sutter County mental health facility after he asked the police to shoot him. He was discharged to Parents later that day. Father spoke with Doreen Osumi, District's Director of Special Education, that evening and told her that Student was going to attend Advent. The next day, November 18, 2005, Parents enrolled Student at Advent.

39. Ms. Osumi provided prior written notice to Parents, dated November 17, 2005, denying their request for District to place Student at Advent.<sup>6</sup> In addition, Ms. Osumi requested that an IEP team meeting be scheduled to discuss Parents' concerns and to make any necessary changes to Student's IEP. Father and Ms. Osumi played "phone tag" for a period of time concerning District's request for an IEP team meeting, but they never scheduled one.

40. In letters dated January 8 and May 7, 2006, Parents requested that District reimburse them for Student's expenses at Advent. Ms. Osumi responded by letter dated May 17, 2006, denying their request for reimbursement. In addition, Ms. Osumi again requested that an IEP team meeting be scheduled, and invited Parents to let her know when they were

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<sup>6</sup> At the time Ms. Osumi wrote this letter to Parents, she had not yet talked with Father and did not know that Student was going to attend Advent.

available. No additional IEP team meeting was held for the remainder of the 2005-2006 school year.

#### *2006-2007 School Year*

##### *August 31, 2006 IEP*

41. Parents requested an IEP team meeting that was held on August 31, 2006. Parents again requested reimbursement for Student's expenses at Advent. Parents remained concerned that Student was not safe in District's school because of his pattern of leaving campus. District offered Student the same placement and services that were previously offered and rejected at the November 2005 IEP team meeting. Parents did not consent to the offered placement. As discussed in Factual Findings 36, this offered placement and services failed to meet Student's unique needs in the area of behavior resulting from his disability, and was not reasonably calculated to provide educational benefit.

##### *Triennial Reassessment*

42. District sent Parents an assessment plan, dated October 5, 2006, for Student's triennial reassessment. Elizabeth Engelken, District's Director of Special Education,<sup>7</sup> sent Parents a letter dated October 30, 2006, with another copy of the reassessment plan. Parents finally consented to the reassessment plan on November 7, 2006.

43. Gina Filipelli, school psychologist, and Diane Bailey, special education teacher, conducted a psychoeducational reassessment of Student in December 2006. The reassessment consisted of a review of Student's educational records, including past assessments; two days of observations at Advent, including interviews of Student, his teachers, and Advent's administrator; and several standardized assessments. Ms. Filipelli and Ms. Bailey concluded that Student met the special education eligibility requirements in the categories of emotional disturbance and specific learning disability.

##### *Core Academics*

44. Student scored in the average range on the Wechsler Individual Achievement Test, Second Edition, in reading comprehension and spelling, in the low average range in math reasoning, written expression, and listening comprehension; and in the low range in numerical calculations. These are generally consistent with Student's last assessment, in October 2003, on the Woodcock-Johnson Test of Achievement – Revised.<sup>8</sup>

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<sup>7</sup> Ms. Engelken replaced Ms. Osumi as Director of Special Education in July 2006 when Ms. Osumi was promoted to Assistant Superintendence of Educational Services.

<sup>8</sup> Student's results in spelling show some improvement over his results in 2003.

## *Behavior*

45. The Beck Youth Inventories assesses a child's perception of his own depression, anxiety, anger, disruptive behavior, and self-concept. Student scored in the average range for depression, mildly elevated range for anxiety and anger, moderately elevated range for disruptive behavior, and much lower than average range for self-concept.

46. The Behavior Evaluation Scale, Second Edition (BES-2), is a rating tool completed by the child's teachers and parents reporting the frequency of the following behaviors: learning problems, interpersonal difficulties, inappropriate behavior, unhappiness/depression, and physical symptoms/fears. Student's three teachers and Father each completed the BES-2. The teachers all rated Student in the average range for all behaviors except physical symptoms/fears. Two teachers rated him below average in that area. Father rated Student in the average range in all areas. During his prior assessment in 2003, Student's classroom teacher at Live Oak rated him average in all areas on the BES-2. His classroom clinician rated him below average in unhappiness/depression and physical symptoms/fears.

47. The Behavior Assessment Scale for Children, Second Edition (BASC-2), measures numerous aspects of positive and negative dimensions of behavior and personality. The Student, his three teachers, and Father completed the BASC-2. One teacher rated Student in the clinically significant range in depression and somatization.<sup>9</sup> Two teachers and Father rated Student in the at-risk range in aggression, conduct problems, anxiety, atypicality, and adaptability. Student rated himself in the clinically-significant range in attention problems. He rated himself at risk in atypicality, social stress, anxiety, somatization, hyperactivity, interpersonal relations, and self esteem.

48. These results indicate additional areas of concern than reflected in Student's prior assessment, in October 2003, when a prior version, the Behavior Assessment Scale for Children (BASC), was administered. In 2003, Student's teacher and classroom clinician rated him at risk in anxiety and depression. The teacher also rated him at risk in aggression and somatization. The clinician rated him at risk in atypicality and social skills. Student rated himself at risk in self-reliance.

## *January 19, 2007 IEP*

49. An IEP team meeting to review Student's triennial reassessment was held on January 19, 2007. The IEP team determined that Student remained eligible for special education services in the category of emotional disturbance and was also eligible in the category of specific learning disability. The team determined that Student has unique needs resulting from his disabilities in the areas of written expression, basic reading, numerical operations, and coping strategies. The team developed goals in each of these areas. Student

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<sup>9</sup> Somatization is the tendency to be overly sensitive to, and complain about, relatively minor physical problems and discomforts.

benefits from structure, an environment with few distractions, clear expectations for his behavior, and close and regular communication between school staff and Parents.

### *Core Academics*

50. The goal in the area of written expression requires Student to write an essay comprised of three paragraphs. The goal in the area of basic reading skills requires Student to identify idioms, analogies, similes, and metaphors in a reading passage. The goal in the area of numerical operations requires Student to develop his ability to perform equations with addition, subtraction, multiplication, division, and inequalities.

51. Student offered no evidence to support his contention that the academic goals failed to meet his unique needs, or that he had academic needs in additional areas. Student offered no evidence that he was not advancing appropriately toward attaining his annual goals or not progressing in the curriculum. He offered no evidence showing that it was unreasonable for the IEP team to conclude that the academic goals were calculated to meet his needs or to enable him to progress in the curriculum.

52. District offered several accommodations to assist Student: shorter assignments, extended time to complete assignments, preferential seating to limit distractions, and nutritional breaks. Student offered no evidence that additional supplementary aids, services, accommodations, or modifications were required to meet his needs, advance toward attaining his goals, or progress in the curriculum.

53. It is undisputed that Student had unique needs in the academic areas of basic reading, written expression, and numerical operations that resulted from his disability. The January 2007 IEP team fashioned academic goals for Student that were reasonably calculated to meet his needs resulting from his disability, and to enable him to progress in the curriculum.

### *Behavior and Mental Health*

54. The IEP team determined that Student's behavior continues to impede his learning and incorporated the 2004 behavior support plan into the IEP.

55. The team adopted a goal addressing Student's need to identify and apply positive coping strategies when confronting anxiety-producing situations. Student offered no evidence to show that this goal is not reasonably calculated to meet Student's needs resulting from his disability.

56. District offered Student placement at Live Oak, a special day class for students with emotional disturbance operated by Sutter County. This is the eighth-grade equivalent of the program that he was in before attending AK. District also offered Student two sessions of individual mental health counseling a week, and a referral to be evaluated for county

mental health services. Parents did not consent to the placement and services offered in the IEP.

57. The special day class at Live Oak has eight to ten students, a teacher, and two aides in the classroom. The class is highly structured and provides a consistent routine. Expectations are clearly defined and communicated. The classroom incorporates principles of behavior modification, such as a point system with clear rewards and consequences for a student's behavior. The Live Oak class has additional clinical and behavioral resources. A school psychologist and behavior intervention specialist are available as necessary. Clinicians work in the classroom and collaborate with classroom staff. Staff are trained and authorized to use interventions, such as containment techniques, that are not available at AK.

58. Student's two mental health providers, Dr. Schiro and Pennisue Hignell, Ph.D.<sup>10</sup>, opined that Student needs an educational setting with structure and consistency. Neither of them observed either AK or Live Oak, or offered an opinion about whether Live Oak was an appropriate placement for Student. It is undisputed that Student was successful when he previously attended Live Oak. The Live Oak program provides Student with the structure, consistency, and intensive behavioral services that he requires to receive educational benefit.

59. The program and services District offered in the January 19, 2007 IEP were reasonably calculated to meet Student's needs in the areas of core academics and behavior resulting from his disability, and are reasonably calculated to provide educational benefit.

#### *Reimbursement for Student's Placement at Advent*

##### *Failure to Provide a FAPE*

60. As discussed in Legal Conclusions 12, a school district may be required to reimburse a parent for the costs of a private school if the child previously received special education services from the district, and the district failed to make a FAPE available to the child.

61. As determined in Factual Findings 36, 41, and 59, District failed to make a FAPE available to Student from November 3, 2005,<sup>11</sup> to January 19, 2007.

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<sup>10</sup> Dr. Hignell holds masters degrees in business administration and community counseling. She has a diploma in Christian counseling and a doctoral degree in clinical psychology. She is a licensed marriage and family therapist.

<sup>11</sup> One of the issues for hearing, as clarified at the prehearing conference, was whether District denied Student a FAPE beginning in November 2005. This decision does not determine whether District denied Student a FAPE prior to November 2005.

### *Reduction or Denial of Reimbursement for Private School*

62. As discussed in Legal Conclusions 13 through 15, reimbursement for the cost of a private school may be reduced or denied if the parents did not provide notice, prior to removing the child from the public school, that rejects the proposed placement, states their concerns, and expresses the intent to enroll the student in a private school. Reimbursement shall not be reduced for not complying with the notice requirement if compliance would likely result in physical harm to the child. The ALJ may determine not to reduce reimbursement even where notice was not provided if, to do so, would likely result in serious emotional harm to the student.

### *Notice of Intent to Remove Student from District*

63. As determined in Factual Findings 27 and 29, at the IEP just prior to removing Student from District and enrolling him at Advent, Parents expressed their concerns to the District about its offer and rejected District's proposed placement. Parents requested District to place Student at Advent. However, they did not express their intention to enroll him at Advent either at that IEP, or in writing ten business days before removing him.

64. Student contends for the first time in his closing brief that Parents did not provide notice because to do so would likely result in either physical harm or serious emotional harm to him. However, the evidence does not support either claim. Father was gravely concerned that Student placed himself in danger by repeatedly running away from school. Student's treating psychiatrist was also concerned that Student acted impulsively, had limited insight, and was at risk from traffic dangers or a child predator. While these concerns are sincere and legitimate, the evidence does not support a finding that either physical harm or serious emotional harm would likely have resulted if Parents had given timely notice of their intent to enroll Student at Advent. There is no evidence that Student attempted to harm himself during any of the run-away incidents. In fact, there is evidence to the contrary. On one occasion, Student went home and called 911 and asked that the police return him to school. Most compelling is that the day before Student was removed from District, he was confined to a county mental health facility and was protected from doing harm to himself or others.

65. There is no basis to excuse Parents from giving District timely notice prior to removing Student and placing him at Advent. Student's request for reimbursement may be reduced or denied because Parents failed to provide timely notice to District of their intent to enroll him at Advent.

### *Evaluation of Parties' Conduct*

66. As discussed in Legal Conclusions 19, the conduct of both parties must be evaluated when determining what, if any, relief is appropriate. Several factors must be considered when determining the amount of reimbursement to be ordered: the effort parents

expended in securing alternative placements; the availability of other more suitable placements; and the cooperative or uncooperative position of the school district.

#### *Parents' Effort in Finding Alternative Placements*

67. Parents did little research before deciding to send Student to Advent. Father researched the internet for residential facilities, but did not find any facilities specializing in children with attention deficit hyperactivity disorder or bipolar disorder. He rejected facilities addressing substance abuse or juvenile delinquency problems, even though Advent enrolls students who have been in trouble with the law.

68. Student's older brother, who did not receive special education services, previously attended Advent, successfully completed the program, and is now attending a secular boarding school. Parents were clearly predisposed to sending Student to Advent even though Students' educational and mental health needs are greater and more complex than his brother's. Although Parents asked Student's two mental health providers for recommendations concerning Advent, they did so only after they had already decided to send him there. Dr. Schiro was familiar with some residential treatment facilities, but Parents did not seriously discuss these options with him.

#### *Existence of Other More Suitable Placements*

69. Both Dr. Schiro and Dr. Hignell opined that Student is benefiting from his placement at Advent. However, neither of them visited Advent. Dr. Schiro's knowledge of Advent is based on information provided by Parents and his knowledge of Student's older brother, who also attended Advent. Dr. Hignell's knowledge of Advent is based on information provided by Parents. Neither of them observed AK, Live Oak, or Advent. Neither of them has recent experience or training evaluating educational placements. Their opinions concerning the appropriate placement for Student are given very limited weight.

70. It is very likely that other more suitable placements were available for Student. Advent does not have any credentialed special education teachers on staff. Advent's curriculum does not meet California's educational standards. Advent does not offer math or writing intervention programs to assist students like Student to develop their skills. The reading intervention available at Advent is self-directed with little teacher contact. In contrast to his contention, Student was not performing at grade level at Advent. Student's performances on standardized assessments while at Advent are generally consistent with prior scores.

71. In February 2007, Student continued to exhibit behaviors similar to those seen at AK, including being easily distracted, having a short attention span, needing supervision, acting impulsively, starting conflicts, getting into fights, and poor study habits. Father testified that most of Student's behavior problems occur in the group home rather than the school setting. However, Student's February 2007 evaluation showed his ratings in the area of behavior for school and the group home were the same. Student has not run away from

Advent; however, he ran away from his home in December 2006 at the end of his holiday break. Advent's program uses physical labor, such as working in a swamp, if a student does not meet the program's expectations. Student offered no evidence that staff at Advent is trained to provide the educational and behavioral interventions to meet his needs.

72. In contrast, District has available to it, and has placed students in, certified, nonpublic, nonsectarian schools both in and outside of California. These certified schools have credentialed special education teachers and are able to provide special education and related services as required by California law, and by Student's needs.

#### *District's Responsiveness to Parents' Concerns*

73. District was not very cooperative with Parents at the November 2005 IEP team meeting concerning available placement options for Student. District staff did not take Parents' concerns very seriously. The meeting abruptly ended when Parents' requested District to place Student either at Advent or Live Oak.

74. When Father informed Ms. Osumi that he was placing Student at Advent, she tried to persuade him to allow District an opportunity to conduct another IEP team meeting to develop a program for Student. This was followed by three letters between November 17, 2005, and May 7, 2006, in which District requested Parents to contact District about scheduling an IEP team meeting. However, at the IEP meeting that was finally held in August 2006, District did not offer any significant change to Student's program. It was not until the triennial reassessment and the January 2007 IEP that District offered Student a program that was reasonably calculated to meet his needs and provide educational benefit.

75. Weighing all of the evidence and considering all of the factors as described in Legal Conclusions 19, the evidence supports denial of Parents' reimbursement for their expenses at Advent. They did not give District an opportunity to explore placement options prior to removing Student. They were committed to placing Student at Advent and were not seriously interested in considering other options. Student has failed to show that Advent is, or is capable of, providing an appropriate program that meets Student's unique needs resulting from his disability and that provides meaningful educational benefit.

#### *Prospective Placement at Advent at Public Expense*

76. As discussed in Legal Conclusions 16, an ALJ may not render a decision that results in placement of a student in a nonpublic, nonsectarian school if the school has not been certified by the California Department of Education.

77. Advent is a sectarian school accredited by the Southern Union conference of Seventh-Day Adventists. Advent it is not certified by the Department of Education. Even if Student could be prospectively placed at Advent, it is not an appropriate placement for Student as determined in Factual Findings 70 and 71.



### *Other Relief*

78. As discussed in Legal Conclusions 18 and 19, compensatory education is an equitable remedy. Relief must be reasonably calculated to provide the educational benefit that would have likely accrued from the special education services that the school district should have supplied.

79. Student neither requested, nor submitted evidence supporting, any relief other than reimbursement for, and continued placement at, Advent.<sup>12</sup> Student offered no evidence that he required a residential placement independent of Advent. Student has not shown that Advent is an appropriate placement for him. There is no evidence showing what relief would be reasonably calculated to provide the educational benefit that Student would have likely received if District provided the special education services to which he was entitled. Accordingly, there is no basis upon which Student may be granted relief.

## LEGAL CONCLUSIONS

### *Applicable Law*

#### *Burden of Proof*

1. As the petitioner, Student has the burden of proving that District did not provide or offer Student a FAPE. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528].)<sup>13</sup>

#### *Requirements of a FAPE*

2. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Improvement Act and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability that are needed to assist the child to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include in pertinent part developmental, corrective, and supportive services, such as mental health counseling services, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

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<sup>12</sup> This is true even though the ALJ requested the parties to discuss in their closing briefs what remedies were available and appropriate if reimbursement for, or placement in, Advent was not awarded.

<sup>13</sup> The prior authority, cited by Student, that District has the burden of proof was in effect overruled by the United States Supreme Court.

3. A school district must provide “a basic floor of opportunity . . . [consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability].” (Bd. of Educ. v. Rowley (1982) 458 U.S. 176, 200.) A school district is required to provide neither the best education to a child with a disability, nor an education that maximizes the child’s potential. (*Id.*, 458 U.S. at p. 197; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Ibid.*) As long as the school district’s program was designed to meet the student’s unique educational needs, was reasonably calculated to provide educational benefits, and comported with the IEP, the district provided a FAPE. (*Ibid.*)

4. A child’s unique educational needs are to be broadly construed to include the child’s academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) A school district must offer a program that is reasonably calculated to provide more than a trivial or minimal level of progress. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 890, citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.) A child’s progress must be evaluated in light of the child’s disabilities. (*Bd. of Educ. v. Rowley*, *supra*, 458 U.S. at p. 202; *Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1996) 103 F.3d 1114, 1121.)

#### *General Requirements of an IEP*

5. An IEP must include annual goals designed to meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general curriculum, and that meet the child’s other educational needs that result from his or her disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd (a)(2).)

6. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams by & Through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 992; *Adams by & Through Adams v. Oregon*, *supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hannover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) The IEP’s goals and methods are evaluated at the time they were developed to determine whether they were reasonably calculated to confer an educational benefit to the student. (*Adams by & Through Adams v. Oregon*, *supra*, 195 F.3d at p. 1149) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Roland M. v. Concord Sch. Comm.*, *supra*, 910 F.2d at p. 992)

#### *Requirements When Child’s Behavior Impedes His Learning*

7. An IEP team must consider whether a child’s behavior impedes his or her learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) If the team determines that it does, it must consider the

use of positive behavioral interventions and supports, and other strategies to address the behavior. (*Id.*)

8. When a child exhibits a serious behavior problem, such as self-injurious or assaultive behavior, California law imposes specific and extensive requirements for the development of a functional analysis assessment and a behavior intervention plan. (Cal. Code Regs., tit., 5, §§ 3001, subd. (f), 3052.) There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan.

9. These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs., tit., 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R V Sch. Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *Escambia County Bd. of Educ. v. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265.)

#### *Revision of IEP*

10. The IEP team must periodically review the IEP, no less frequently than annually, to determine whether the annual goals are being achieved, and revise it as appropriate to address (1) any lack of expected progress toward the annual goals and in the general curriculum; (2) the results of any reassessment; (3) information about the student provided to or by the parents in connection with a reassessment; (4) the student's anticipated needs; and (5) any other relevant matter. (20 U.S.C. § 1414(d)(4)(A); Ed. Code, § 56341.1, subd. (d).) When an IEP is reviewed, the team must consider whether a child's behavior impedes his or her learning. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i), (b)(2); Ed. Code, § 56341.1, subd. (b)(1).)

#### *Reimbursement for Private School Tuition*

11. A district is not required to pay for the cost of education, including special education and related services, for a child attending a private school if the district made a FAPE available to the child and the parents chose to place the child in a private school. (20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. § 300.148(a); Ed. Code, § 56174.)

12. A district may be required to reimburse a student's parents for the costs of a private school if the child previously received special education and related services from the district and the district failed to make a FAPE available to the child. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); Ed. Code, § 56175.)

13. Reimbursement for the costs of a private school may be reduced or denied in any of the following circumstances: (1) at the most recent IEP meeting the parents attended before the student was removed from public school, the parents did not provide notice rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (2) the parents did not give written notice to the school district ten business days before removing their child from the public school rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (3) before the parents removed their child from the public school, the school district gave the parents prior written notice of its intent to evaluate the student, but the parents did not make the student available for evaluation; or (4) the parents acted unreasonably. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.)

14. Reimbursement for the costs of a private school shall not be reduced or denied for failing to provide notice of intent to remove the child from the public school in any of the following circumstances: (1) the school prevented the parent from providing notice; (2) the parents were not informed of the notice requirement; or (3) complying with the notice requirement would likely result in physical harm to the child. (20 U.S.C. § 1412(a)(10)(C)(iv)(I); 34 C.F.R. § 300.148(e)(1); Ed. Code, § 56177, subd. (a).)

15. An ALJ has discretion not to reduce or deny reimbursement for the costs of a private school if the parents failed to provide the required notice of intent to remove the child from the public school under either of the following circumstances: (1) the parent is illiterate or cannot write in English; or (2) complying with the notice requirement would likely result in serious emotional harm to the child. (20 U.S.C. § 1412(a)(10)(C)(iv)(II); 34 C.F.R. § 300.148(e)(2); Ed. Code, § 56177, subd. (b).)

16. An ALJ may not render a decision that results in the placement of a student in a nonpublic, nonsectarian school if the school has not been certified by the California Department of Education under Education Code section 56366.1. (Ed. Code, § 56505.2, subd. (a).)

17. A nonpublic, nonsectarian school is a private, nonsectarian school that enrolls students eligible for special education services under an IEP, employs at least one full-time teacher who holds an appropriate credential authorizing special education services, and is certified by the California Department of Education. (Ed. Code, § 56034; Cal. Code Regs., tit. 2, § 60010, subd. (o).)

### *Compensatory Education*

18. It has long been recognized that equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496, citing *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996].) Compensatory education is an equitable remedy; it is not a contractual remedy. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3, supra*, 31 F.3d at p. 1497.)

19. There is broad discretion to consider equitable factors when fashioning relief. (*Florence County Sch. Dist. Four v. Carter by & Through Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361].) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3, supra*, 31 F.3d at p. 1496.) Factors to be considered when considering the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the school district. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1487; *Glendale Unified Sch. Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1109.)

20. An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

### *Determination of Issues*

*Did District fail to offer Student a FAPE beginning in November 2005 and continuing through the 2006-2007 school year by failing to meet his unique needs in the areas of core academics and behavior?*

21. Based on Factual Findings 12, 17, 20, and 22, and Legal Conclusions 1 through 6, and 9, Student's June 2005 IEP met his needs in the area of core academics and behavior. The goals in the areas of core academics and behavior were reasonably calculated to meet Student's needs resulting from his disability. The IEP incorporated a behavior plan that was reasonably designed to result in lasting positive changes in Student's behavior through skill acquisition and reduction of problem behavior in the least restrictive environment.

22. Based on Factual Findings 36 and Legal Conclusions 1 through 6, and 9, the November 2005 IEP failed to meet Student's needs in the area of behavior resulting from his disability and, because of this, was not reasonably calculated to provide educational benefit. Student had run away from campus on several occasions, he was no longer responding positively to previously-successful interventions and strategies, and his behavior was

deteriorating. The action of the IEP team, to change Student's writing class, was not reasonably calculated to address Student's behavior needs or provide educational benefit.

23. Based on Factual Findings 41 and Legal Conclusions 1 through 6, and 9, District failed to offer placement and services in the August 2006 IEP to meet Student's needs in the area of behavior resulting from his disability. The offered program was not reasonably calculated to provide educational benefit.

24. Based on Factual Findings 53 and 59, and Legal Conclusions 1 through 6, and 9, District offered a placement and services in the January 2007 IEP meeting Student's needs in the areas of core academics and behavior resulting from his disability, and that was reasonably calculated to provide educational benefit. District offered Student placement in a program in which he had previously been successful. The program provides a small class geared toward the needs of students with emotional disturbance and behavioral needs. District also offered Student individual mental health counseling.

25. Based on Legal Conclusions 22 through 24, District failed to provide or offer Student a FAPE from November 3, 2005, through January 19, 2007.

*Are Parents entitled to reimbursement for his placement at Advent from November 2005 through the present?*

26. Based on Factual Findings 65, 67, 68, and 70 through 75, and Legal Conclusions 13 through 15, Parents are not entitled to receive any reimbursement for Student's placement in Advent. Parents failed to provide District timely notice of their intent to place Student at Advent. Advent does not provide special education services Student needs.

*Is Student entitled to continued placement at Advent at District's expense?*

27. Based on Factual Findings 77 and Legal Conclusions 16 and 17, Student is not entitled to continued placement at Advent at District's expense. Advent is a secular nonpublic school that is not certified by the Department of Education. Advent does not provide Student an appropriate education.

*Is Student entitled to any relief?*

28. Based on Legal Conclusions 18 through 20, there is broad equitable authority to fashion relief. However, based on Factual Findings 79, there is no evidence showing what relief is reasonably calculated to provide Student the educational benefit he would have

received if District provided a FAPE from November 3, 2005, through January 19, 2007. Because of this, any relief would be arbitrary and without basis. Accordingly, Student is not entitled to relief in this proceeding.

### ORDER

All of Student's claims and requests for relief are denied.


### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. Student partially prevailed on Issue 1. District prevailed on all remaining issues.

### RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: June 4, 2007



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JUDITH A. KOPEC  
Administrative Law Judge  
Office of Administrative Hearings